BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

The District Court rendered no reported opinion in granting the motion of petitioner for a directed verdict notwithstanding the verdict of the jury. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 111 F. (2d) 257, and is made part of this record.

II.

THIS COURT HAS JURISDICTION

The respondent, Mrs. Ida C. Boult, is a citizen and resident of the State of Mississippi. The petitioner, the Maryland Casualty Company, is a corporation organized and existing under the laws of the State of Maryland and is a citizen and resident of that state. The recovery prayed for in plaintiff's petition aggregates $7,500.00 with interest. Judgment was rendered in the District Court, after the reversal by the United States Circuit Court of Appeals, in favor of respondent for $7,500.00 with accrued interest and costs.

III.

JURISDICTION INVOKED

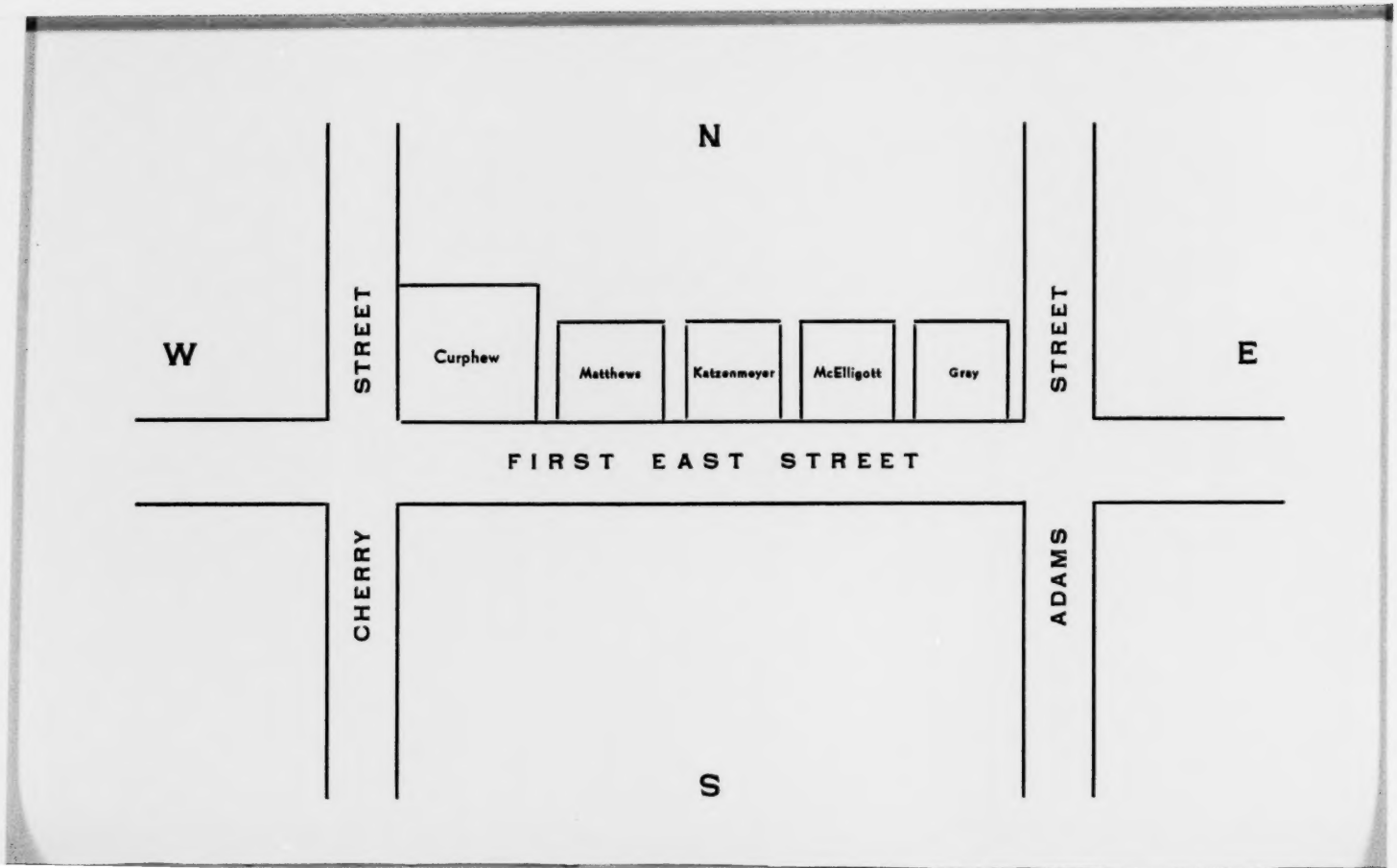
The jurisdiction of this court is invoked under U. S. Code, Title 28, Section 347; Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, Subsection (b).

IV.

STATEMENT OF THE CASE

A *combination sickness* and *accident* policy was issued by the Appellee to the Deceased, R. W. Boult, of Vicksburg, Mississippi, in May 1916. At that time, Mr. Boult was engaged in the business of repairing and building homes. He continued in that business with the customary financial reverses following the boom period of 1929. For almost forty years, he had been in such business in Vicksburg, a small city of approximately 25,000 population. For a long number of years he had resided in that section of the city in which the events, hereinafter detailed, took place. It is undisputed that he was most familiar with every foot of the ground in the neighborhood, having built and repaired houses throughout.

Mr. Boult belonged to the Woodmen of the World and maintained an insurance policy with that order, in addition to the policy here involved, and others. His old friend of thirty years standing, a Mr. McElligott, a next door neighbor of Mr. Boult in earlier years, moved to a small cottage on First East Street, in 1921. This was within four and one half blocks of Mr. Boult's home, and was in a neighborhood extremely familiar to Mr. Boult. Mr. McElligott lived on the North side of First East Street. The block in which he lived was bounded on the East side by Adams Street and on the West side by Cherry Street. The diagram on following page shows the location of the houses on that side of the street bounded as aforesaid.


N
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For fifteen years Mr. Boult had been in the habit of paying his monthly premiums to Mr. McElligott, coming to his home for that purpose. Only occasionally, he would send the premium by some one else. On the day in question, March 7th, 1938, in the afternoon, about four-thirty, on a clear, bright day, Mr. Boult drove to First East Street in his car and parked the same on the North side of that street, headed to the West, towards Cherry Street. He parked his automobile at a point evidently between the Curfew Home and a Mrs. C. H. Matthews. Inexplicably, he then went and sat on the porch of *Mrs. Matthews,* who was out. When Mrs. Matthews came home that afternoon, she found Mr. Boult sitting on a bench on her gallery. "He got up and told me he wished to pay his Woodmen dues." Mrs. Matthews then told him that he was at the wrong place and directed him where to go, to Mr. McElligotts. She then went on in her house, Mr. Boult leaving the porch. Mr. Boult then went next door and *sat on the steps of Mr. Katzenmeyer's home.* Mr. Katzenmeyer who was visiting across the street, saw him and went over and spoke to him. Mr. Boult told Mr. Katzenmeyer that he was looking for Mr. McElligott. He was then told, of course, that Mr. McElligott lived next door, that he was then at the home of Mr. Katzenmeyer.

Mr. Boult then went to Mr. McElligott's home and paid his premium with a check already made out. To his old friend, the latter, he appeared nervous and moody and depressed, though otherwise normal. He then left and went out and got into his car. There was a large pile of dirt four feet high in the street near the curbing in front of his car. It was still bright daylight. Mr. Boult drove his car directly into the dirt, and, naturally, could go no further, though he accelerated the motor thereof, resulting in his wheels simply spinning in the same spot. Mr. Katzenmeyer, seeing the situation, came over to the car and inquired what was the matter. On being told by Mr. Boult that the car "wouldn't go," Mr. Katzenmeyer advised him that he couldn't "go" because of the big pile of dirt which was in plain view of Mr. Boult, and he would have to back up and go around the pile of dirt. Mr. Boult said all right, backed

up, and then drove straight ahead into the pile. Mr. Katzenmeyer was in a quandary. Mr. Boult was sitting in the car, looking straight ahead and "it looked like he was dazed." Mr. Katzenmeyer, not knowing what to think, told Mr. Boult that he had driven right back ino the dirt, which was in plain sight. Again he stated to Mr. Boult that he would have to back up and pull around and miss the dirt. But once more, he confounded Mr. Katzenmeyer by backing up and then driving straight ahead into the mound.

With this abnormal behavior on the part of Mr. Boult, Mr. Katzenmeyer then had him back up, and himself got on the running board and pulled the wheel around so that Mr. Boult would miss the dirt. Mr. Boult started off, Mr. Katzenmeyer stepped to the ground and Mr. Boult continuing his car in the direction in which Mr. Katzenmeyer had steered it, drove down to the corner of Cherry and First East Street, just about 150 feet away, and without deviating, drove up on the curbing at the southwest corner of that intersection, killing the engine of his car. He then proceeded South on Cherry Street, driving one block. When he reached the intersection of Cherry and Main Streets, his engine died or was "killed." At that point, he was seen by Mr. Holliday, to whom Mr. Boult appeared nervous. Finally, Mr. Boult got the car moving and proceeded farther south towards the intersection of Cherry and Jackson Streets. Midway the block, he was travelling slow enough to indicate to Mr. Holliday that he was getting ready to pull over to the curb and park. His motor was sputtering. He did not park, however, and continued on to the intersection of Cherry and Jackson streets.

According to the eye-witness, Holliday, who was a block north thereof and downgrade, a car, being driven west at the intersection of Jackson and Cherry Streets, drove into the intersection and stopped, permitting Mr. Boult to make a normal and natural curve to his, Mr. Boult's, left in the intersection, as if he were going to proceed East on Jackson Street. The other eye witness, Mr. John Franco, who was in a position to better see the situation, stated that Mr. Boult drove in-

to the intersection behind the West bound automobile, at a rate of speed of about twenty-five miles per hour. Both of these witnesses, the only two eye-witnesses at this point, stated that Mr. Boult did not swerve his car and that there was absolutely no traffic whatever on Jackson Street, which might have prevented or obscured or interfered with his making his normal turn and proceeding East on Jackson Street.

However, Mr. Boult simply drove straight on and hit the curbing on the South side of Jackson Street, East of the intersection of Jackson and Cherry. The testimony is undisputed at this point, as the only eye witness to the occurrence here was Mr. Franco, who stated that Mr. Boult hit the curbing, blowing out two of his tires. A grocery store was located on the southeast corner of the intersection facing on Cherry Street. Between the north side of this grocery store and Jackson Street, there were the following: a grass plot about five feet wide; a sidewalk 8 or 9 feet wide; and an additional ten feet of space between the sidewalk and the side of the store building. After getting up on the curbing and into this space between the street and the store, he turned his car towards the East. "He speeded his car and ran directly over the garbage can, which was sitting just about at the end of the store near the curbing." "He ran over the garbage can and that stopped his car. One of his rear wheels was lifted. He speeded his motor. His wheel was turning and his car wouldn't move." "The back wheel,—at least one of his back wheels was elevated from the ground. It was sitting over this garbage can. Mr. Boult attempted to move off it by racing his motor, but the car wouldn't move due to the fact that his rear wheel was elevated from the ground."

Several witnesses then went to the car and found him sitting therein. According to the testimony, one witness stated that "he sat there for a few minutes and then he got out by himself and he was very shocked and dazed and stood there."

Mr. Holliday: "Someone said "the back wheel is off the ground, do you want us to call 522? He said, "No, I will get Mr. Jeffcort." And didn't look at the speaker at all—just

staright ahead. I noticed then that there seemed to be something wrong with Mr. Boult. My wife was with me. He turned loose the wheel and reached for the car door inside. I opened the door and said, "Do you want me to help you out?" He said, "I guess I can make it." But he seemed to be unsteady. He stood there with me a few minutes and then he started up the walk on the sidewalk and stopped. He felt in his back pocket and then walked on up the street, but he was very nervous. He was pale and like that."

Another: "When he got out of the car, he was shaking all over, like somebody that would be afraid."

Another: "I don't know. I don't think any body knew why he didn't get out. They offered to help him out, but he just sat there. It was fully five minutes before he opened the door and got out. He was looking straight ahead (when he was sitting in the car.)"

These were all of the witnesses at this juncture. All of them are positive that Mr. Boult behaved at this time just as he did with Mr. Katzenmeyer on First East Street, and all of them stated that Mr. Boult refused all assistance and walked alone a full block to the filling station on the next corner run by Mr. Jeffcort. There he fell, appeared blind, obviously was ill and was assisted home by his son.

At home, Mr. Boult was put to bed. Paralysis spread down the left side of his body until death occurred some five or six hours later. His demise took place around midnight and his funeral was held in the afternoon, approximately 14 hours later.

When Mr. Boult was put to bed, efforts were made to contact the family physician, Dr. Walter Johnson. Not succeeding in rapidly locating Dr. Johnson, Dr. G. P. Sanderson was summoned. The latter remained with Mr. Boult long enough to diagnose his illness as "a stroke of apoplexy or cerebral hemorrhage." Dr. Sanderson left when he was informed that Dr. Johnson, *who had been treating Mr. Boult,* was then on his

way. Dr. Johnson remained with Mr. Boult until his death, a period of approximately 5 hours.

It was conclusively established that Mr. Boult suffered no bruises or blows of any kind. There was not even a scratch or the slightest mark on his body.

The foregoing are the basic facts as disclosed by the record. During the trial the appellant introduced herself and the close members of her family, as well as the employees of Mr. Boult in an effort to show two things: First, that Mr. Boult was a poor driver, and second, that he had been a well man.

With reference to his ability as a driver, these persons testified and as follows:

Mrs. Boult, the appellant: Over a long period of time, 22 years, he was a horrible driver. He had no serious accidents but would swipe cars, bumping up his fenders, running up on curbs, knocking down concrete posts.

Jno, J. Franco: He was not a good automobile driver.

Owen Holliday: Saw him run up on a curb on one occasion and he wouldn't hold out his hand in making a turn.

Mrs. Denis H. Stafford: Ran into the curbing once, and nearly ran into her once.

Caroline Kemper, Employee: Though she did not mind riding with him, he was a pretty bad driver and would scare her.

Mrs. Eugenia Boult, daughter-in-law: Mr. Boult, in stopping would frequently bump over the curbing and on to the sidewalk.

Mrs. Pauline Boult Dement, daughter: He was not a good automobile driver. She felt uncomfortable when he was driv-

ing. On one occasion, he ripped off the license tag on her car.

Meredith Schaff, mechanic: He was a poor driver. Came near running into me once. Would hit the curb at a pretty good clip when parking.

Jim Calvert, negro employee: Didn't consider him a good driver. Would cut the corner in turning curves. A few years ago saw him run up on the curb in turning.

McKinley Thomas, negro employee: Was a poor driver. One day he ran over the curbing.

Bryan McGinney, negro employee: Scared to ride with him. Ran up on the curbing and nearly hit the witness. Would frequently hit the curb and in parking and pulling out, would hit fences.

James E. Parker, white employee: Ran into a pole on a truck on one time and 4 or 5 times ran up on curbings.

M. T. Walker, white carpenter: Would run across the curb, scrape telephone post, and in parking would bump into cars.

T. R. Barnes: Didn't like to ride with him.

R. K. Barnes: He didn't seem to be a good driver. Would run on curbs around the shop, and would bump cars in backing in and out.

Jno, H. Woods, carpenter: Bump into cars and hit curbs and go into the sidewalks.

C. H. Jeffcort, filling station employee, at which the Boult's traded: "I never noticed anything about his driving with the exception of hitting the curb. He would slide along the side of the curb there nearly every time. That is the way he would leave out. If his wheels were cut toward the curb he would go right on. He would never straighten his car. I laid that to the fact that he was always in a hurry.

Wm. Boult, son: He was an extremely poor driver. Knew that he was in habit of running up on curbs.

A number of witnesses were introduced to show that Mr. Boult was in good health and normal spirits. These witnesses consisted of members of the family and employees. His physician, however, Dr. Walter Johnson, who had been treating Mr. Boult, and although he was subpoenaed and present, was not put on the stand. Dr. Sanderson, who attended him for only a few minutes, until the arrival of Dr. Johnson, was called by the appellant and testified.

The testimony of the Doctors will be discussed later in this brief. At the trial, the Honorable District Judge in accordance with his interpretation of the new rules, permitted the case to go to the jury over the objection of the appellee and then sustained the latter's motion for judgment notwithstanding the verdict of the jury.

It might be well to call the attention of this Honorable Court to the fact that the policy granted the right of autopsy to appellee. Demand was made for such by it, although the same would have entailed exhumation. By the decision of the Mississippi Supreme Court in the case of U. S. F. & G. Co. v. Hood, 124 Miss. 548, 87 So. 115, such a provision was held void, the same being based, in our judgment on extremely false reasoning. The demand for an autopsy was prior to the celebrated Erie Railroad Co. v. Tompkins case. With the advent of that opinion, no defense is here predicated on the failure to permit the autopsy, nor was the same urged on the lower Court, though the point was preserved for the record's sake.

THE ARGUMENT.

A. Analysis Of The Facts.

Several features predominate in a study of the facts in this case. Not the least among them is the conclusion, as to which no reasonable men can differ, that the proof as to the poor

driving ability is insufficient to account for the abnormal behavior of Mr. Boult on First East Street. Absent-mindedness alone would not cause a normal man to go to Mrs. Matthews home when he was looking for the home of Mr. McElligott. Bear in mind that there were only five homes in that block. The West house was on a one hundred fifty foot lot and was being transformed into an apartment house. Then there were four small houses. Mr. McElligott's was the second small house from the East corner, and was located between two small houses. Mr. Boult went to the second house from the West corner, next to the large home.

It would strain one's credulity to believe that a normal person could have performed in such a manner, in the light of his thorough familiarity with the neighborhood, and his almost monthly visits over a period of fifteen years to the McElligott home. But, when this is coupled with his stopping at the Katzenmeyer house after being *directed* to McElligott's, the breaking point is reached, and only those, blinded with a prejudice against insurance companies, or sucked on by greed, would for a moment advance an excuse of absent-mindedness.

Add to this, his actions in thrice,—not once, not twice, but three times—slamming into the dirt pile. But, with $7,500.00 at stake, such behavior becomes normal because Mr. Boult was a poor driver, who frequently scraped the tires on his car, who ran over curbings, and who hit obstacles in parking. And this theory is pushed forward in view of the undisputed testimony of Mr. Katzenmeyer that he explained to Mr. Boult each time what he was doing. Undoubtedly, the contention will be made that Mr. Boult was absent-minded and paying no attention to Katzenmeyer. Truly a most fortunate coincidence of poor driving and absent-mindedness for the appellant.

The above facts uncontradicted are sufficient, if standing alone, to defeat any recovery in this case. But more important than this is the controlling factor that considering the situation from every angle most advantageous to Appellant, the conclusion is inevitable that Boult could not have died from the

simple shock or excitement of this alleged accident without a concurrent contributing internal disorder. Disregarding for the moment any evidence of the same, reasonable men cannot differ in holding that normal people or persons suffering from no more than natural infirmities, do not die from mere excitement or the so-called shock of such an accident as here presented. As stated by Dr. Sanderson, Appellant's witness, if such were true, we would all be dead. The proof is clear in this case that there was no traumatic injury of any kind.

Now let us examine the so-called proof of the alleged health of Mr. Boult. In Mississippi, a rather strenuous Privileged Communications Statute is in full flower. In this State, this privilege cannot be waived after the death of the person. In practice, however, if the plaintiff administrator or beneficiary offers such physician and no objection is made by the defendant, the testimony is received.

Our Supreme Court has seen fit, while the party is still alive, to grant an instruction to the jury to the effect that if the plaintiff has failed to place on the witness stand the physician who treated plaintiff, that such may create the presumption that the physician's testimony would have been unfavorable to the plaintiff. This ruling is an outgrowth of the settled principle that where one party has a witness in his control and fails to produce such witness on the trial the presumption is thereby created.

Beard v. Williams, 172 Miss. 880, 161 So. 750; Robinson v. Haydel, 177 Miss. 233, 171 So. 7.

The general effect of the privileged communication statute, as Your Honors probably know, is to make extremely difficult the procuration of legal evidence as to the physical condition of a person. What was common knowledge, for instance, in this community about the condition of Mr. Boult would not be admissable. What every one knew, and accepted as being true, could not be presented to the Court.

The appellant saw fit to introduce Dr. Guy Sanderson, who treated Mr. Boult for a short time on the evening of his death. The Appellee, though having a legal right to object to such testimony, in the interests of truth declined so to do. Dr. Johnston, who had been treating Mr. Boult and who was the only repository of the real evidence as to the condition of Mr. Boult, although present, although the family physician of the appellant and a close personal friend of all of the members of the family, was not placed on the stand. His testimony, which would have been to a slight extent more positive than that which was obtained as to the condition of Mr. Boult, was withheld from the court.

In passing we must say that it is rather strange that the two members of the family—the daughter, Mrs. Pauline Boult Dement, and the son, Dorsey Boult—who were absent from the bosom of the family until the time of the trial should be the only two members of the family who were either interested enough in their parent or observant enough to know something of Mr. Boult's condition. Mrs. Dement testified:

> "Q. During the last couple of years of his life he never confided to you that he was suffering from high blood pressure and had been warned by his physician not to exert himself?
> "A. *I knew that he had high blood pressure.*
>
> "Q. He, however, was not a man to go around talking about it?
> "A. No.
>
> "Q. And you probably were the closest one of the family to him?
> "A. Yes sir, until the last eighteen months.
>
> "Q. Reber had gone off and Dorsey had gone off and Billy was working for the government, and you worked for him (Boult)?
> "A. Yes sir.

"Q. He didn't even confide in you that he was suffering from high blood pressure?

"A. No.

"Q. *But you knew that he was?*

"A. *Yes sir.*

"Q. During the last couple of years of your father's life, *he got more nervous than he had been, did he not?*

"A. *I would say he did, yes.*"

Mr. Dorsey Boult, the son, in direct contradiction to the Vicksburg members of the family testified that his father was always of more or less nervous disposition.

Dr. Guy Sanderson, who left his treatment of Mr. Boult on the evening of his death because he was told that Dr. Johnston had been treating him, stated on the witness stand that when he arrived, which was within approximately a half hour of the occurrence, Mr. Boult's blood pressure at that time was high, that he didn't remember the exact reading of it but remembered distinctly that it was over 200, and that that, in connection with the weakness of the left arm and left hand, confirmed to him his own diagnosis of cerebral hemorrhage.

The two experts called by the appellant, Dr. Messina and Dr. Lewis, both flatly testified that after the hemorrhage occurs there is a lowering of the blood pressure and that there is then a gradual rise to the original point.

Dr. Messina testified that before the blood pressure arrived again at its original point, at least an hour or two hours would have to expire.

Dr. Lewis testified that it might take two days, and sometimes it remains the same.

Both of them testified that the normal blood pressure of a

man the age of Mr. Boult should be under 150; that over 150 is high blood pressure.

Both of said experts, put on the stand by the appellant, testified that pressure over 200 was extremely high.

Dr. Walter Johnston signed the death certificate of Mr. Boult and stated that Mr. Boult died of hypertension. Hypertension is simply a medical name for high blood pressure.

These experts, Dr. Sanderson, Messina and Lewis, though their testimony was in some instances ludicrous, all testified that the death of Mr. Boult was caused by an inward excitement which cooperated with the concurrent contributing cause of either an aneurysm or high blood pressure to effect the death of Mr. Boult. A careful examination of their testimony illustrates the correctness of this assertion.

The purport of Dr. Sanderson's evidence is that Mr. Boult died of a cerebral hemorrhage which was caused by the shock or excitement of the accident; that there was no evidence in his examination other than the history of Mr. Boult to indicate to him that the cerebral hemorrhage came as a result of anything but the ordinary and usual condition he had of high blood pressure; that the blood vessel wouldn't break like that from shock or excitement unless the condition of the blood vessel itself was weak or unless there has been pressure generating high blood pressure for a period of time; that if this were not true we would all have cerebral hemorrhage; that experience teaches him that a person doesn't have a cerebral hemorrhage from mere shock or excitement unless there is present high blood pressure or something of that kind. That anything can produce a cerebral hemorrhage; that a person may have eaten a hearty meal and be lying in bed, or sitting in a chair, or the person may stoop over or may cough, all of which may produce a cerebral hemorrhage; that ordinarily a cerebral hemorrhage is produced by some exertion or some mental shock or some undue physical condition. That if the doctor certified the cause of death as being hypertension, that in his opinion

the hypertension and the cerebral hemorrhage were *concurrent* in producing the death.

The following is the testimony of Dr. Sanderson which is particularly significant in this case:

"Q. In other words, your experience over a period of years has taught you that a person does not have a cerebral hemmorrhage just from a mere accident unless there is some condition present there?

"A. Yes sir.

"Q. And in your experience and observation of traumatic fracture or anything of that character, so far as this case is concerned, there is no proof of anything but the mere shock and excitement of running into the curb? There must then have been present high blood pressure or some other causative factor sufficient to have produced the cerebral hemorrhage in addition to shock and excitement?

"A. *That would be expected.*

"Q. And in addition to that, wouldn't you say as a matter of fact that the high blood pressure that he must have had at that time would have been sufficient to at some other time,—maybe 10 minutes later, maybe an hour later,—when he was exerting himself in any fashion, also have caused his death?

"A. Yes sir, if a man has excessive high blood pressure and some weakening of the arteries,—if he has a setup for a hemorrhage, anything might cause it.

"Q. The point I have in mind, the evidence does not disclose any traumatic fracture of the skull. The fact that he had a cerebral hemorrhage from this excitement and shock, from your experience indicates to you, does it not, that unquestionably Mr. Boult had the set-up for a hemorrhage?

"A. *That would be the natural supposition.*

"Q, In other words, he could have had the same cerebral hemorrhage, undoubtedly if he had it from shock and excitement, at some other spot from any other slight cause?

"A. It is possible.

"Q. And then you would say, undoubtedly, would you not, from those facts, that this hemorrhage or this blood pressure or this condition which set up the cerebral hemorrhage coming from the result of excitement, that it must have been severe enough to endanger his life at any time?

"By Mr. Teller: You mean if he had a different accident?

"By Mr. Brunini: No.

"A. I think I answered that before. Anything can produce a cerebral hemorrhage or it may occur without any apparent cause at all."

Dr. Messina, in answer to the direct question presented to him by the appellant as an expert, said:

"Yes sir, I think so, because in the accident the physical jar and mental excitement and shock would naturally cause his blood pressure to rise. In all excitement usually the first way that the body reacts is in a rise in the blood pressure. In that way, I think having a hypertension already,—probably the amount of hypertension he had at the time, the blood vessels were strong enough to hold it, but in a time of excitement the blood pressure would go up higher and in reaching the climax the blood vessel would rupture"; and with this in mind he thought that it was most probable that the hemorrhage occurred at the time the automobile ran on the curbing at the A. & P. grocery store. That his experience and all medical textbooks disclose that whenever you have a cerebral hemorrhage, as did Mr. Boult, that necessarily there exists a condition in the arteries which permits the excitement to produce the hemorrhage.

Dr. Messina further testified that at any time Mr. Boult had an exciting cause he could have had a cerebral hemorrhage.

Dr. Lewis testified:

> "Q. It is true from the textbooks that a person who is 64 years of age and with blood pressure of 200 or over, that blood pressure is a constant danger to his life? It may take some *exciting cause* to cause his death, but he is in danger all the time?
>
> "A. Yes, he is in danger all the time. You just don't know."

That there is no doubt about that being a dangerous state.

As seen from the above, and also if this Honorable Court examines the testimony of these doctors, the simple conclusion is that they have all testified that there must an inward exciting cause in the way of excitement which causes the blood pressure to rise, resulting in the hemorrhage. This, of course, is in consideration of the fact that there was no traumatic injury, and it is not contended by these physicians, or by the appellee, that a hemorrhage could not result from a fractured skull, which did not here exist.

B. THE GENERAL APPLICABLE LAW.

The Mississippi decisions on policies of the character involved in this case are few. In order to more clearly understand those decisions, we first wish to discuss the general law on the subject. We have found the same so logically and exhaustively reviewed by Cornelius in his work, "Accidental Means", that we shall refer extensively thereto. We are unable to improve upon that work.

We quote from that portion headed:

"CLASSIFICATION AND DISCUSSION OF AUTHORTIES ON THE QUESTION AS TO WHEN AN INJURY MAY BE CONSIDERED AS THE SOLE CAUSE OF DEATH.

"We have already pointed out in the opening chapter of this brief that there is no liability under the usual insuring clause of a modern accident policy, until the claimant has established not only that the insured has received an injury effected through external, violent and accidental means, but also that an injury so effected has been the sole cause of death or disability.

"In their effort to confine their liability to cases where the injury is the sole cause of death, the companies have made use of many qualifying adjectives and phrases and have provided that the injuries must be "the sole cause of death"; must cause death "independent of any other cause"; must be the sole and exclusive cause of death" etc. For further illustrations see the insuring clauses quoted on page 4.

"It would seem clear that when a company has stipulated in its policy, in substance, that it is not to be liable unless death results solely and independently of all other causes from a bodily injury, it has stated as explicitly and unquivocally as is possible, that there is to be no liability when some cause other than the injury is a contributing factor in bringing about death. In other words, under a policy restricting liability as clearly as is unquestionably done in the foregoing illustrations, it would seem pure redundancy to say more. As there is to be no liability unless the injury is the sole cause, the direct cause and the cause independent of every other cause, it follows as a logical and absolute unescapable conclusion, that there can be no liability where a disease or bodily defect or infirmity, existing at the time the injury is received, contributes to bring about death. If a disease or bodily defect existing at the time an injury is received, co-operates with the injury in bringing about death, the injury is certainly not the sole cause of death, nor is it the cause independent of every other cause.

"The companies, however, appear to have considered it

necessary, after having in the insuring clause promised to pay only for death brought about solely and independently of all other causes by an injury, to add another proviso to the effect that there shall be no liability when the death is contributed to by any disease, defect or bodily infirmity. After having once stated a proposition clearly, explicitly and unequivocally, there certainly can be no necessity for again stating it in another way. This is, however, exactly what the companies have done very frequently.

"Upon reviewing the reported cases we find that until some years ago the great majority of policies construed contained this surplusage. For illustration: in what we have termed the redundant clause the companies have provided that the insurance shall not cover death "resulting wholly or partly, directly or indirectly, in consequence of any disease"; "resulting directly or indirectly from bodily or mental infirmity or disease in any form, proximate or contributory, as a primary, secondary or final cause of death," etc., etc. It would serve no good purpose to lengthen this brief by further illustrations.

"It must be remembered that we are not now discussing or considering cases where the injury is brought about by a disease. We have already shown that an accident company, in order to protect itself from liability where death is caused by an injury, which injury is brought about by disease, as, for instance, where an insured overcome by disease falls in front of an approaching train, must stipulate, in substance that there is to be no liability where the injury is occasioned wholly or partly, directly or indirectly, by disease. We have covered this question fully in the discussion appearing under Propositions 5 and 6. We are now only concerned with the question as to when an injury, effected in a manner covered by the policy may be regarded as the sole cause of death.

"Naturally the courts which have construed policies containing the redundant clause referred to above have

commented and relied upon same in their decisions. This fact has given rise to a somewhat prevalent belief that the redundant clause is necessary. A few courts which have become notorious for their brazen proclivity to disregard the plain terms of an insurance contract and seize upon any pretext to hold an insurance company liable, have found it convenient, in construing policies from which the redundant clause has been omitted, to distinguish other decisions, laying down correct principles, on the theory that those principles only apply when the policy contains the surplusage. In so doing they have purposely, or otherwise, refrained from giving effect to the plain words of insuring clauses providing, in substance, that there is to be no liability unless the injury is the sole cause of death independent of every other cause. It is comforting to note, however, that other courts, mindful of the great underlying principles of the law which they are sworn to enforce, and unmoved by popular clamor, have construed these contracts according to their evident meaning and have pointed out that their effect is precisely the same whether the redundant clause is present or not.

"It may be stated, therefore, as a general proposition, that there is no liability under the usual form of accident policy when the insured, at the time he receives an injury is suffering from a disease, bodily defect or infirmity which co-operates with the injury to bring about death. This statement applies even though the disease or bodily infirmity would not have brought about death except for the injury, although in a few cases, where the courts have arrived at correct conclusions, they have made obiter statements seeming to indicate that unless the disease is potentially fatal, the company is liable. If the accident would not have caused death except for the disease, but the insured dies because the injury aggravates the effects of the disease, or the disease aggravates the effects of the injury, there is no liability.

"The courts in a few cases have attempted to distinguish

between an existing disease and a mere susceptibility to disease. A clear majority of those courts which have considered this question have held that if there is no disease actually existing at the time the injury is received, but the insured by reason of prior attacks of disease, from which he has fully recovered, is peculiarly susceptible to a recurrence, and, because of that susceptibility, the injury brings about a recurrence of such disease, and the two together cause death, the company is liable.

"Even where the insured is suffering from disease at the time he receives an injury the company is liable, if that injury is sufficient to, and actually does, bring about death entirely independent of the disease. Thus if an insured, suffering from heart disease, is struck by lightning and killed, the company is liable. So also is it where the insured, even though suffering from all the bodily ills known to medical science, accidentally falls in front of a train and is cut to pieces.

"If the injury causes a disease which in turn causes death, the courts have uniformly and correctly held that the injury is the sole cause of death and that the company is liable.

"In determining the question of liability where a disease is a factor in bringing about death, it must be borne in mind that it is essential to determine whether the disease was present at the time of the injury, or ensued subsequent to the injury as a necessary consequence thereof. For illustration: if an insured, suffering with diabetes, receives an accidental cut or scratch and, as a consequence of existing diabetes, infection and death follow, there is no liability. If an insured slips and falls, thus receiving an injury through accidental means, which would not be fatal except for some abnormal or diseased condition, but is at the time suffering from hardening of the arteries or other disease or bodily defect, which contributes to bring about death, the company is not liable. On the other hand, if an insured in ordinarily good health accidently cuts his

finger and blood poisoning ensues, causing death, or if he accidently falls and receives a violent blow on the chest, bringing about a fatal attack of traumatic pneumonia, the company is liable.

"Even though the insured has received an injury through accidental means, causing disability, there is no liability if, subsequent to the happening of the injury, the insured contracts an independent disease with which the injury has no causal connection, and such disease brings about death.

"A nice question is presented in connection with this kind of a case when it appears that the insured, subsequent to receiving the injury, has acquired an independent disease of the character just mentioned, but the evidence indicates that he would not have succumbed to the disease except for lowered vitality and decreased resistive power consequent upon the injury. There is some conflict among the decisions on this question. The preponderance of authority seems to sustain the proposition that, even under such circumstances, there is no liability unless the disease is actually traumatic in its origin. For example, there is no liability where a man, in a debilitated condition because of injury, acquires smallpox or pneumonia and, because of his debilitated condition, succumbs to such a disease.

"Unfortunately the companies are themselves largely responsible for a confusing and hybrid doctrine which has crept into the law applicable in this class of cases, and which we will, for lack of a better term, refer to as the doctrine of proximate cause. If in considering the meaning of the word "proximate" the courts could entirely divorce themselves from the principles of law applicable in personal injury cases the situation would be different. As a matter of fact the majority of cases which are presented to Appellate Courts for determination involve controversies over alleged liability for negligence. One of the most

confusing and involved doctrines arising in this class of cases is that generally known as the doctrine of proximate cause. It is one of the many propositions which cannot, because of its infinite variety and multiple possibilities, be accurately stated in general terms. The courts are, however, everywhere saturated with different and irreconcilable ideas as to when negligence may be considered as the "proximate cause" of an injury.

"The companies have frequently provided in their policies that there is to be no liability unless the injury is the "proximate cause" of the death or unless it is the "sole and proximate cause,"etc. In construing such policies the courts, in the majority of instances, seem to have appreciated that negligence cases, involving the question of proximate cause, are not altogether applicable. They have however, consciously or unconsciously, been largely influenced by their preconceived notions of what a proximate cause is, derived from their familiarity with negligence cases. As a result a very abstruce doctrine of negligence law has been injected into the law of accident insurance, giving rise to endless confusion.

"It is the habit of some courts to look upon all accident policies as sui generis. They seem totally unable to comprehend that under a given state of facts there may be liability under one policy and no liability under another. Just because one court, in its consideration of a policy providing that the company is to be liable if the injury is the "proximate cause" of death, has been obliged to comment upon the word "proximate" and to construe it, and in so doing has naturally relied upon negligence cases involving the doctrine of proximate cause, other courts, when called upon to consider other policies, containing different nomenclature, and from which the companies have carefully omitted the word "proximate", proceed to say that the company is liable if the injury is the proximate cause of death, and to rely upon negligence cases in determining that question. Happily the majority of the

companies have now realized their mistake. It is also cheering to note that a few courts have recently "seen the light."

"Even now, however, many of the companies are using the objectionable phraseology, and the courts in fully seventy-five per cent of the reported decisions, pertinent in this connection, have discussed the meaning of the word "proximate" and have repeatedly used it in conveying their ideas as to the principles of law applicable, irrespective of whether the policies provided to pay where the injury was the proximate cause of death or specifically limited liability to cases where the injury should be the sole cause.

"In most of these cases the conclusions of the courts are correct and also, in many instances, their use of the word "proximate" is justified because of its presence in the policies. When, however, an attempt is made to rely upon the doctrine of proximate cause as applied in negligence cases the gates are opened wide for infinite conjecture and misunderstanding. For this reason the decisions of those courts which have been warranted in using the term, and those which have used it inadvisedly, have been misunderstood and misconstrued.

"We venture to hope that some time, in the not far distant future, the companies will cease the use of this decidely objectionable phraseology, and that eventually, by painstaking and careful effort, the attorneys representing them will be able to eradicate the doctrine of proximate cause as it is applied in negligence law from the law of personal accident insurance.

"We shall now proceed to a consideration of the decisions.

Proposition No. 18.

"WHERE THE INSURED AT THE TIME HE RECEIVES AN INJURY IS SUFFERING FROM DISEASE, BODILY DEFECTS OR INFIRMITY WHICH, ACTING WITH THE INJURY AS A CONTRIBUTING FACTOR, BRINGS ABOUT DEATH, OR WHEN SUCH EXISTING DISEASE, DEFECT OR DEFORMITY AGGRAVATES THE EFFECT OF THE INJURY, OR THE INJURY AGGRAVATES THE EFFECTS OF THE DISEASE, AND BOTH, ACTING TOGETHER, CAUSE DEATH, THE INJURY IS NOT THE SOLE CAUSE OF DEATH AND THERE IS NO LIABILITY.

"U. S. Mut. Acc. Assn. v. Barry 1889, 9 Sup. Ct. Rep. 755; 131 U. S., 100, affirming Barry v. U. S. Mut. Acc. Assn., 1885, 23 Fed. 712.

"Nat'l Mas. Acc. Assn. v. Shryock, 1896, 73 Fed. 774.

"Travelers Ins. Co. v. Selden, 1897, 78 Fed. 285

"Com. Trav. Mut. Acc. Assn. v. Fulton, 1897, 79 Fed. 423. (See same case, 2nd appeal, 1899, 93 Fed., 621, where the court held that under the evidence at the second trial the case was for the jury.)

"Hubbard v. Mut. Acc. Assn., 1897, 98 Fed. 930.

"Hubbard v. Travelers Ins. Co., 1899, 98 Fed., 932.

"Nat'l. Assn, of Ry. Post. Clerks v. Scott, 1907, 155 Fed., 92.

"Ill. Com. Men's Assn. v. Parks, 1910, 197, Fed. 794.

"Aetna Life Ins. Co. v. Ryan, 1918, 255 Fed., 483.

" Stanton v. Travelers Ins. Co., 1910, 83 Conn. 708; 78 Atl. 317.

"Maryland Cas. Co. v. Morrow, 1914, 213 Fed. 599.

"Preferred Acc. Ins. Co. v. Patterson, 1914, 213 Fed. 595.

"Kerns v. Aetna Life Ins. Co. 1923, 291 Fed. 289.

"Smith v. Fed. Life Ins. Co., 1925 (Dist. Court) 6 Fed. (2nd) 283.

"Order of United Com'l Travelers v. Nicholson, 1925, 9 Fed. (2nd) 7.

"Employers Liab. Assur, Corp. v. Dean, 1930, 44 Fed. (2nd) 524.

"Ryan v. Continental Cas. Co. 1931, 47 Fed. (2nd), 472.

"Jefferson Standard Life Ins. Co. v. Lightsey, 1931, 49 Fed. (2nd) 586.

"Stokely v. F. & C. Co., 1915, 193 Ala. 90; 69 So. 64.

Standard Acc. Ins. Co. v. Hoehn, 1926, (Ala.) 110 So. 7.

"Kellner v. Travelers Ins. Co. 1919 (Cal.) 181 Pac. 61.

"Clarke v. New Amsterdam Cas. Co. 1919 (Cal.) 179 Pac. 195.

"Michner v. Fid. & Cas. Co. of N. Y. 1925 (Ia) 203 N. W. 14.

"Moore v. Ill. Com. Men's Assn. 1911, 166 Ill. App. 38.

"Crandall v. Continental Casualty Co., 1913, 179 Ill. App. 330.

"Robison v. U. S. H. & Ins. Co. 1915, 192 Ill. App. 475.

"Sharpe v. Com. Trav. Mut. Acc. Assn. 1894, 139 Ind. 92; 37 N. E. 353.

"Binder v. National Mas. Acc. Assn. 1905, 127 Ia. 25; 102 N. W. 190.

"Pac. Mut. Life Ins. Co. v. Despain, 1908, 77 Kan. 654; 95 Pac. 580.

" Stull v. U. S. H. & A. Ins. Co. (Ky) 1909, 115 S. W. 234.

"Aetna Life Ins. Co. v. Bethel, 1910, 140 Ky. 609; 131 S. W. 523.

"North American Acc. Ins. Co. v. Hill's Admrs., 1918, 182 Ky. 125; 206 S. W. 170.

"Feitel v. Fid. & Cas. Co. of N. Y. 1920 (La.) 84 So. 491.

"Frerichs v. London & Lancashire Ind. Co. 1929, (La.) 124 So. 821.

"Thomas v. Fid. & Cas. Co. 1907, 106 Md. 299; 67 Atl. 259.

"Leland v. Order of United Coml. Travelers, 1919 (Mass.) 124 N. E. 517.

"Jiroch v. Travelers Ins. Co., 1906, 145 Mich. 375; 108 N. W. 728.

"White v. Standard Life & Acc. Ins. Co. 1905, 95 Minn., 77; 103 N. W., 735-884.

"Campbell v. Aetna Life Ins. Co. (Mo.) 1920, 222 S. W. 778.

"Ward v. Aetna Life Ins. Co. 1908, 82 Neb. 499; 118 N. W. 70; 2nd Appeal, 1909, 85 Neb. 471; 123 N. W. 456.

"Runyon v. Monarch Acc. Ins. Co. 1932 (N. J.) 158 Atl. 530.

"Smith v. Mass. Bonding & Ins. Co. 1924, 202 N. Y. Supp. 857.

"Ward v. Coml. Travelers Mut. Acc. Assn. 1931, 249 N. Y. Supp. 43.

"Penn v. Standard Life & Acc. Ins. Co., 1911, 158 N. C. 29; 73 S. E. 99; on rehearing, 76 S. E. 262.

"Harris v. Provident Life & Acc. Ins. Co. 1927 (N. C.), 137 S. E. 430.

"Aetna Life Ins. Co. v. Dorney, 1903, 68 Ohio State, 151; 67 N. E. 254.

"Young v. Cont. Cas. Co. 1924 (S. C.) 122 S. E. 577.

"Troupe v. Benefit Assn. 1930 (S. D.) 231 N. W. 529.

"Western Indem. Co. v. MacKechnie, 1916, (Texas); 185 S. W. 615. See same case, 214 S. W. 456.

"Continental Causalty Co. v. Peltier, 1905, 104 Va. 222; 51 S. E. 209.

"Borosich v. Metropolitan Life Ins. Co. 1927, (Wis.) 215 N. W. 575.

"Cretney v. Woodmen Acc. Co. 1928, (Wis.), 219 N. W. 448.

"In all of the foregoing decisions, with the exception of

the Barry case, the second decision of the Fulton case, and the Jiroch, Patterson, Clark and Lightsey cases, the court's holding was in favor of the companies. In the six decisions just mentioned it was held that the case was for the jury under proper instructions. This list has been carefully selected and fully sustains the proposition to which it is cited.

"In many of these cases the policy construed contained a proviso against liability for death contributed to in any way by disease which we have heretofore referred to as the redundant clause. Inasmuch as, in our opinion, for reasons already given in full, the extent of liability is precisely the same whether this clause is present or not, providing of course that the insuring clause is in the usual form, we have, in compiling the foregoing list, made no attempt to distinguish the cases in reference to that feature. We shall subsequently discuss the authorities sustaining what we consider to be the self-evident proposition that the liability, in so far as questions now under discussion are concerned, is exactly the same under both policy forms. An interesting example of this is to be found in the case of Page v. Commercial Travelers Eastern Accident Association, 1916, 225 Mass. 335; 114 N. E. 430. There the policy sued upon did not contain the so-called redundant clause, but merely insured against death caused "wholly and entirely by external, violent and accidental means." It appeared that the deceased stumbled and fell to the sidewalk receiving a severe blow on his head followed by almost immediate death. The death certificate, however, introduced in evidence, stated the cause of death as chronic arterio-sclerosis. Here, even in the absence of any provision in the policy excluding death caused by or contributed to by disease, the court held that the undisputed statement of facts in the death certificate controlled the inference that might otherwise arise from the fact of the fall followed by immediate death, rendering it impossible to say as a matter of fact that death resulted from the fall independently of disease. The court obviously

appreciates the force of the sole cause provision independently of the redundant clause.

* * * * * * * * * *

"When the insuring clause of an accident policy limits liability to death brought about by injuries "solely and independently of all other causes," or words of substantially the same meaning, it is not necessary to add a further proviso, in substance, to the effect that there shall be no liability where death results wholly or partly, directly or indirectly, from disease or bodily defect or infirmity, and the legal effect of the policy is precisely the same whether or not it contains the additional clause.

"Crandall v. Continental Casualty Co., 1913, 179 Ill. App., 330.

"Penn. v. Standard Life & Acc. Ins. Co., 1911, 158 N. C., 29; 73 S. E., 99; on rehearing, 76 S. E., 262.

"The Crandall case was decided in March, 1913, by the Appellate Court of Illinois. The decision is a very elaborate and able one, and the court exhaustively reviews the authorities on both sides of the questions under discussion in this chapter. It had before it a policy providing to pay death indemnity if the insured should receive a bodily injury which should "necessarily and solely" result in death. The policy did not contain the redundant clause heretofore referred to. The court said:

"In considering the various cases arising on accident insurance contracts containing similar provisions, we must bear in mind that the policy under consideration here is not one with the general undertaking to answer in case of . . . death from accidental causes with a clause excepting specific causes and thus limiting the general liability . . . There are . . . cases where the undertaking is limited, as in this case, by its own terms as first stated, yet followed by

exceptions of specified causes, that, without such express exceptions, could not have fallen within the stipulated undertaking to pay. This form of policy seems to have been quite usual in the time of the earlier cases and less common in later years. We see no difference in construction of an insurance contract where the undertaking is as first stated clearly to answer only for death from some limited cause or causes, whether it is followed by express exception of some cause not there included or not. If the stipulation be to pay in case of death from poison, it is immaterial whether or not it is followed by an express provision that the insurer will not be liable in case of death from some other specified cause. The plaintiff must aver and prove death from poison. Yet, in discussing cases containing such useless exceptions, the courts have often naturally referred to them as express provisions that the insurer would not be liable in such event. The legal effect of the policy is the same whether the redundant provision is present or not"

"The Penn case first decided by the Supreme Court of North Carolina in December, 1911. That decision is reported in 158 N. C., 29; 73 S. E., 99. Another opinion was sebsequently written in November, 1912, on petition for rehearing. The opinion last referred to appears, in 160 N. C., 399; 76 S. E., 262. In the first opinion, on page 100 of the 73rd Southeastern, and in the second opinion, on page 263 of the 76th Southeastern, the court referred to the case of Carr v. Pacific Mutual Life Ins. Co., 100 Mo. App., 602; 75 S. W., 180; as authority for the statement that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and further said that such conditions "could have no more force than the general provision, 'independent of all other causes'."

"The Crandall and the Penn cases seem to be the only ones where the courts have specifically held that the legal effect of the policy is precisely the same whether the redun-

dant clause is present or not. The opinion of Judge Carnes in the Crandall case, and the opinions of Judge Walker in the original decision and on petition for rehearing, in the Penn case, contain unquestionably the best and most carefully considered statements of the law applicable in this class of cases. Both of these Judges evidently took the time to thoroughly review the authorities, and we commend these decisions to the careful study of anyone interested in the propositions of law under discussion.

"See Also,

"Rheinheimer v. Aetna Life Ins. Co., Ohio, 1907; 77 Ohio State, 360; 83 N. E., 491.

"In that case the policy contained the usual insuring clause and in addition the redundant clause, excepting liability where death should result wholly or partly, directly or indirectly from disease. The lower court instructed the jury that there could be no recovery unless injuries effected through accidental means caused the death solely and independently of all other causes, without referring to the redundant clause. The defendent complained that the trial court should have further instructed that there would be no liability if the death was occasioned wholly or partly, directly or indirectly, by disease, etc. The court said on page 496 of the 83rd Northeastern:

"The court in charges given, had stripped from the real issue some of these qualifying words which to the jury might seem mysterious, and which might even confound them, and gave their purport and meaning in clear and simple terms. For if the accident was the sole cause of death, and . . . it was so caused independently of any other cause, then it did not result partly from any other cause: . . ."

"In many other cases the courts appear to have recognized that Proposition No. 18 is correct, since they have laid down the rule that there is no liability where disease,

defect or infirmity, existing at the time the injury is received, contribute to the death, when the policies under consideration did not contain the redundant clause, and have relied, in support of this conclusion, upon the early cases construing policies which did contain that clause. For illustration we call attention to the following authorities fully sustaining Proposition No. 18, in all of which cases the policies construed, in so far as the opinions show, did not contain the redundant clause:

"Nat'l Assn. of Ry Post. Clerks v. Scott, 1907, 155 Fed., 92.

"Stanton v. Travelers Ins. Co., 1910, 83 Conn., 708 78 Atl., 317.

"Stull v. U. S. H. & A. Co., (Ky.) 1909, 115 S. W., 234.

"Aetna Life Ins. Co. v. Bethel, 1910, 140 Ky., 609; 131 S. W., 523.

"Thomas v. Fid. & Cas. Co., 1907, 106 Md., 299; 67 Atl., 259.

"Ward v. Aetna Life Ins. C., 1908, 82 Neb., 499; 118 N. W., 70; 2nd Appeal, 1909, 85 Neb., 471; 123 N. W., 456.

"Continental Casualty Company v. Peltier, 1905, 104 Va., 222; 51 S. E., 209."

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There are two decisions of the Fifth Circuit Court of Appeals which are of assistance in the instant case. The first decision, decided prior to the hearing of the Erie Railroad v. Tompkins case, is that of Ryan v. Continental Casualty Company, 47 F. (2d) 472. This opinion was rendered by Judge Walker of that Court and is so similar in fact to the instant case that we are constrained to quote the opinion in full:

"This was an action by the appellant on a policy issued by the appellee whereby the latter promised to pay to the

former a stated sum for the loss of life of Charles J. Ryan, her husband, 'resulting from a personal injury which is effected solely and independently of all other causes by the happening of an external, violent and purely eccidental event.' The evidence showed as follows: At the time of his death the insured was forty-four years of age. Prior to his assisting in loading ice in a railroad car on the morning of his death he appeared to be in good health. While an employee of the ice company of which insured was the manager was engaged in loading ice into the car the insured took part in that task. While pulling ice from a truck into the car he slid and sat down, and he fell a second time on his face. Then he got up, held one hand on his chest, and walked to a platform on which he laid down. After lying there for awhile he got up and went to his home in an automobile driven by his son. He died about thirty or forty minutes after reaching his home. A physician found him there in a state of shock, cold, clammy, and pale, and complaining of pain in his chest. The physician stated that he had his hand on deceased's pulse when it stopped; that his pulse was good right up to the time it stopped, but it stopped very suddenly, and he went right into a convulsion and died. He also stated that he was at a loss as to the cause of the death until he heard that the undertaker had found that there was a leak, and he then guessed it was a ruptured aorta; that he did not see any external evidence of an injury; and that he did not know that it is possible, from a medical standpoint, for the aorta of the human body to be ruptured by any fall, no matter how violent, unless there was some external evidence of that fall. One would have no feeling after the rupture of the aorta, as death at once would follow such a rupture. The undertaker who embalmed the deceased's body testified that in injecting the embalming fluid the face and upper part of the body responded, but that it appeared that there was no circulation in the lower part of the body, which led him to believe that there was an obstruction or rupture which interfered with the circulation. After the body had been embalmed there was an autopsy.

The report of the physician who conducted the autopsy stated:

" 'No external signs of violence on body.

" 'Thoracic cavity; lungs looked apparently normal.

" 'Heart; phecardium had a number of small holes about the eighth of an inch in diameter, muscles of the heart proper had a like condition, that is a number of perforations throughout its substance, also the arch of the aorta had a hole in it.

" 'The perforations of the heart were most likely made by use of trocar in the process of embalming, but I cannot positively state whether the perforation of the arch was a spontaneous condition or was caused by the use of trocar.'

"Upon the conclusion of the evidence the court directed a verdict in favor of the defendant.

"The appellant was not entitled to recover unless the death of the insured resulted from a personal bodily injury which was effected solely and independently of all other causes by the happening of an external, violent, and purely accidental event; and the burden was on her to prove that the death was so effected or caused. It seems that a conclusion that the physical condition of the insured following his taking part in the loading of ice in the car, and his death, were due solely to his accidenal slipping and falling or sitting down, and were not proximately contributed to by his voluntary exertion in handling ice, would have been a mere guess or surmise, and not a finding based on evidence having a substantial tendency to prove that what accidently happened was the sole cause of such condition and the death. Carswell v. Railway Mail Ass'n (C. C. A.) 8 F. (2d) 612, 614; Baldwin v. North American Accident Ins. Co. of Chicago (C. C. A.) 22 F. (2d) Ill. To say the least, the conclusion that the insured's state of

shock, and that he was cold, clammy, pale, and in pain after taking part in the loading of ice, were due in whole or in part to the exertion which he voluntarily made, was as consistent with the evidence adduced as the conclusion that what accidently happened was the sole cause of his change of condition. But, assuming that insured's change of condition would not have been caused by his voluntary exertion of the accidental slipping had not occurred, and that the change of condition was not due wholly or partly to the voluntary exertion, we are of opinion that the evidence adduced did not warrant a finding that his death was so caused as to give rise to a liability of the appellee under the policy sued on, because no phase of that evidence had any tendency to prove that what accidentally happened was capable of causing the death if the insured prior to such accidental happening, was not affected with a disease or bodily infirmity which contributed to his change of condition and death. *There was no evidence furnishing any support for a finding that the death of a person in anything like normal health could have been caused solely by such a slipping and sitting or falling down as the evidence tended to prove. Though the insured sustained a personal injury by the happening of an external violent and purely accidental event, his death was not brought about solely and independently of all other causes by that accident, if at the time the accident occurred it would not have caused his death if he had not then been afflicted with a previously existing disease or infirmity, and if the accident had not aggravated the effect of the disease or infirmity, or the disease or infirmity had not aggravated the effect of the accident.* National Masonic Acc. Ass'n v. Shryock (C. C. A.) 73 F. 774; Kerns v. Aetna Life Ins. Co. (C. C. A.) 291 F. 289; Aetna Life Ins. Co. v. Ryan (C. C. A.) 255 F. 483; Commercial Travelers' Mut. Acc. Ass'n v. Fulton (C. C. A.) 79 F. 423. It cannot fairly be denied that the evidence as to the circumstances attending the physical collapse of the insured and his death persuasively indicated that before and at the time of the accidental event, which evidence tended to prove, the in-

sured was afflicted with some serious internal ailment or defect, and that such preexisting ailment or defect caused or proximately contributed to his death. We think the evidence adduced was such that the court would have been warranted in setting aside a verdict which involved a finding that the death of the insured resulted from a personal injury which was effected solely and independently of all other causes by the happening of an external violent and purely accidental event. This being so, the above mentioned ruling was not erroneous.

"The judgment is affirmed."

After the Erie Railroad v. Tompkins case, the Fifth Circuit Court of Appeals had occasion to construe a similar policy of insurance which had been written in the state of Georgia. The contention was made in that case that the Georgia decisions permitted recovery where the disease was a concurrent and contributing cause. The case referred to is that of Mutual Life Insurance Company v. Loeb, 107 F. (2d) 7. We quote from the opinion of that Court:

"Defendant's physicians testified that while septicemia was present as a contributing cause of her death, it was only a contributing cause, and she did not die as the result of the infection, except as it was contributory to and with the diseases she had for some years. Plaintiff's physicians in no manner disagreed with this statement. The only difference in the medical testimony was in the emphasis placed, respectively by plaintiff's and defendant's physicians, on septicemia on the one hand, on the diseases on the other. Plaintiff's physicians stated that the blood stream infection made the diabetes and nephritis worse than they were, that is, the infection brought about an immediate precipitation of the diabetes and kidney trouble and that she would not have died at that time if it had not been for the infection. Whereas, defendant's physicians say, that the infection was made worse by the existence of the diabetes and kidney trouble, and that while she probably would not have died at that time except for

the infection, she would not have died then, with the infection, but for the preexisting diseases.

"Appellee's position on the evidence is, that the testimony of their physicians that the insured would not have died from diabetes if she had not had this infection was sufficient if believed, to rest a verdict on, that the death occurred solely and independently of all other causes, and did not result either directly or indirectly from diseases or bodily ailments. Appellant's position is that, conceding the truth of this testimony, it does not change the unquestioned fact that she died not as a result of septicemia, solely and independently of all other causes, and not directly or indirectly as the result of infirmity or disease, but as the result of septicemia as effected and contributed to by the diseases which had already totally and permanently incapacitated her, so that, under the policy, she was then drawing monthly benefits. Appellees in support of their position insist that there is a settled judicial construction of policy provisions, such as those at bar, especially in the state of Georgia, that the presence of disease does not prevent recovery for death by septicemia, resulting from accidental injury, where the proof establishes that it was a moving and efficient cause of death, though the presence of the diseases was a contributing factor. Appellant denies that there is any such judicial construction, either generally or in Georgia. It insists that the Georgia cases on which plaintiff relies, particularly, Hall v. General Accident Assurance Corporation, 16 Ga. App. 66, 85 S. E. 600; Thornton v. Traveler's Insurance Company, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, construed a policy with different terms from those at bar, and that Massachusetts Protective Association v. Lewis, 3 Cir., 72 F. 2d 952, which construed a policy like this one, went off on peculiar facts, present there and absent here.

"These facts are: that at the time of the injury in the Lewis case, the streptocci germs a the base of the insured's tooth, which by the injury were freed, and let loose in his system, were before the injury sealed in, and the

insured was not only suffering from, but was totally and permanently incapacitated by diseases, which had undermined and impaired her constitution and her resistence to infection and its results, and that reasonable minds could not reach any other conclusion under the evidence, than that the injury to her hand, caused her death, not solely and independently of all other causes, but only because its onset were associated and acted with and on the pre-existing diseases.

"Much has been written in connection with suits of the general nature of this one. The general principles controlling its solution have been laid down with unusual uniformity in State and Federal Courts. For the purpose of this opinion, it will be sufficient to refer to some of the leading ones. Aetna Life Ins. Co. v. Ryan, 2 Cir., 255 F. 483; Carpenter v. Connecticut Gen. Life Ins. Co., 10 Cir., 68 F. 2d 69; Clarke v. Order of United Commercial Travelers, 5 Cir., 99 F. 2d, 457; Davis v. Standard Life Ins. Co., 5 Cir., 73 F. 2d 330, 96 A. L. R. 599; Harrison v. New York Life Ins. Co., 6 Cir., 78 F. 2d, 421; Korff v. Travelers Ins. Co., 7 Cir. 83 F. 2d 45; Mass, Protective Ass'n v. Lewis 3 Cir. 72 F. 2d 952; Ryan v. Continental Casualty Co., 5 Cir., 47 F. 2nd 472; Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287. 94 Am. St. Rep. 99; Preferred Accident Ins. Co. of New York v. Combs, 8 Cir. 76 F. 2d, 775.

"How the principle is applied in each case depends, of course, upon its particular facts. Indeed, each of these cases, as it addresses itself, first to the court to determine if there is an issue of fact, and next to the jury to determine its solution, turns upon its peculiar facts. In none of the many cases, to which our attention has been drawn, have the facts relied upon to make out a case more clearly, failed to do so, than they do here.

"Defendant's motion for an instructed verdict should have been granted. For the error in refusing it, the judgment is reversed and the cause is remanded for further and not inconsistent proceedings."

C. THE MISSISSIPPI DECISIONS.

There are only four Mississippi decisions on this subject. These four cases were relied on both by petitioner and respondent. The opinion of the United States Circuit Court of Appeals interprets these decisions as permitting recovery in the instant case, although it did not attempt to announce the rule set forth in these decisions other than to say that in case of doubt such doubt is to be resolved in favor of the insured rather than the insurer. This, of course, is the general law.

The four decisions of the Mississippi Supreme Court are as follows:

Pervangher v. Union Casualty Company, 85 Miss. 31, 37 So. 461;

U. S. F. & G. Company v. Hood, 124 Miss. 548, 87 So. 115;

Continental Casualty Company v. Daniels (not officially reported), 173 So. 302; and

Metropolitan Life Insurance Company v. Williams, 180 Miss. 894, 178 So. 477.

The Pervangher v. Union Casualty Company case, supra, was heard in the Supreme Court on an appeal from a demurrer to a declaration. In the declaration were contained three counts. The first count charges that the insured died April 14, 1901, within ninety days of the accident which caused his death, which was effected, solely, directly, and independently of all other causes, by bodily injury sustained through external, violent, and accidental means—to-wit, injury to his lung or lungs, or some part thereof, or some part of his body adjacent to or connected with his lung or lungs, or the rupture of some blood vessel, caused by being strained in lifting or handling some heavy machinery or heavy substance on the 26th of February, 1901. The second count alleges the death as

set out in the first, and adds that the death was caused means, in an injury to his lung or lungs, or stomach, or some part thereof, or some part of his body adjacent thereto, connected with his lung or lungs, or stomach, or the rupture of some blood vessel, caused by being strained in lifting or handling some heavy machinery or heavy substance, and the said substance, while being so lifted or handled, fell against or struck the said assured, causing the injury hereinbefore set out and described. The third count charges the death of the assured as in the first count, and alleges that his death resulted from bodily injuries sustained through external, violent, and accidental means, in an injury to his lung or lungs, or stomach, or some part thereof, or some part of his body adjacent thereto, or connected with his lung or lungs, or stomach, or the rupture of some blood vessel, caused by some accident, the nature of which is unknown to plaintiff.

In a very short opinion, the Supreme Court held:

> "The demurrer is to the whole declaration, which contains three counts. We all agree that the second count is a good one, and that therefore the judgment sustaining the general demurrer must be reversed. Where an accident from external means results in internal injuries, we think it sufficient to so charge, without specifying the particular organ hurt, and it is not every strain that will take the injury out of the protection of the policy. This would depend on the facts; and if the first and third counts should be made more definite as to the circumstances of the injury, the proof might develop a case warranting a recovery under them."

You can see there from that the Supreme Court held that the second count was good because it contained the further allegation, differentiating it from the first count, that "the said substance (machinery), while being so lifted or handled, fell against or struck the said assured, causing the injury hereinbefore set out."

In the instant case there is no evidence whatever of an trauma or of any injury except the exciting inward cause, rai ing the blood pressure and thereby bursting an aneurysm or blood vessel.

In the U. S. F. & G. Company v. Hood case, supra, the a sured had suffered a severe fall, striking the back of his hea He had also been suffering from a latent disease. Accordi to the testimony of the physicians the injury to the head wo up or precipitated the dormant disease, so that it became acti and caused the death of the assured. The policy provision that case was: "the effects resulting directly and exclusively all other causes from bodily injury sustained during t life of this policy, solely through accidental means."

The Supreme Court in that case attempted to lay down rule to apply in Mississippi. That rule is as follows:

> "It is not sufficient to defeat the policy that the ac dent may have made some latent disease active, whi disease contributed in some degree to the death. If t disease was active and of such character and virulen as to endanger life apart from the accident, but might n have done so had the accident not happened, then th may be said to be a proximate contributing cause."

In this connection the Court also said:

> "We think that if the accident is the proximate cause the death and sets in motion or starts a latent or dorma disease, and such disease merely contributes to the dea after being so precipitated by the accident, it is not a pr imate cause of death, nor a contributing cause within t meaning of the terms of the policy."

The Court, also, in this decision took pains to call attenti to the fact that under the policy before it in the Hood ca the question of disease was not contemplated by the parti

The Court said:

"The condition of health or the existence of latent and inactive disease evidently was not contemplated by the parties in making the contract. No medical examination was required, and the pleadings did not seek to question the answers given by the assured as to his condition of health at the time the application was signed."

In the instant case the policy of insurance before this Honorable Court specifically refers to disease in the following language: "against loss . . . effected solely through external, violent and accidental means, independently and exclusively of disease, whether disease pre-exists or be afterward contracted, and all other causes."

In the Continental Casualty Company v. Daniels case, Supra, (which was not officially reported) the proof was that the deceased "returned to his home, suffering from a wound located near and to the rear of his right ear, the wound being of such character as to make it apparent that the injury was the result of external and volent means." The court in a very brief opinion held that the case was for the jury, and we think rightfully so under those facts. The court, however, in discussing the case said:

"His condition soon became alarmingly serious, and he was removed to a hospital, where he died on the third day thereafter. A prominent surgeon of long and varied experience in such matters testified, in substance, as the jury was justified in construing his evidence, that, in his opinion, the death was the probable result of the wound; but another competent physician and surgeon testified that the death was the sole result of an existing disease of the brain—and it may be conceded that there are some features of the record which tended to corroborate the latter view. But as against this there was an offer by the beneficiary in the policy, the widow of the deceased, to allow a post mortem examination of which the company failed to avail itself."

In passing, it might be noted that in the instant case permis-

sion for the autopsy was refused by the appellant and, further, that the doctor was withheld from the stand. Evidently the Supreme Court of the State of Mississippi considers this an appropriate subject of comment.

The next and latest decision of the Mississippi Supreme Court is that of Metropolitan Life Insurance Company v. Williams, 180 Miss. 894, 178 So. 477. This suit involved a Texas insurance contract and the law of that state was controlling, of course. "The fleshy part of the palm of his (assured) hand was injured near the little finger, the injury consisting of a scratch and breaking of the skin for approximately one-half inch in length; that his hand had turned blue and was swollen." There was evidence that the assured had suffered from diabetes but there was also testimony that this condition was not serious and that the cause of death was blood poisoning.

In discussing the question, the Supreme Court of Mississippi cited the U. S. F. & G. Company v. Hood case, supra, quoting therefrom as follows:

> " 'We think that, if the accident is the proximate cause of the death and sets in motion or starts a latent or dormant disease, and such disease merely contributes to the death after being so precipitated by the accident, it is not a proximate cause of death nor a contributing cause within the meaning of the terms of the policy.'
>
> "And the court further says: 'There are numbers of cases, and especially cases in the federal court, which hold to the contrary of the doctrines herein announced, but we think the authorities cited in support of this opininon adopt the true rule. It is not sufficient to defeat the policy that the accident may have made some latent disease active, which disease contributed in some degree to the death. *If the disease was active and of such character and virulence as to endanger life apart from the accident, but might not have done so had the accident not happened, then that may be said to be a proximate contributing cause.*

> The court ought not to construe a contract so as to defeat rather than promote the purpose of the party in taking out the insurance.' "

From the foregoing decisions, it is clear that the law in Mississippi, as in practically every other state, is that if the injury precipitated the trouble then there is coverage. If, however, the two concurred in producing the death, there is no liability.

According to the physicians who testified for respondent, there was in this suit concurrent causes of death, namely, the excitement and the weakened condition of the blood vessels along with high blood pressure. The excitement did not start the trouble or merely set it in motion. The two combined at the same instant and produced the rupture.

The interpretaton placed upon the Mississippi law by the United States Circuit Court of Appeals leads to absurd and illogical conclusions. It converts an accident into a straight life policy. A man, lying in bed suffering from high blood pressure, may have a stroke at any moment. If a member of the family stumbles against the bed, shaking it, and a stroke results, such becomes an accidental death according to the opinion of the Court of Appeals. The shaking was external and accidental.

If a person scratches a pimple on his face, the blood running, becomes excited and suffers a stroke, his would be an accidental death. The scratching leads to a result that was unexpected and unforeseen, therefore accidental. The sight of the blood and the accidental scratch caused the blood pressure to rise, the vessel to rupture and death to ensue. Consequently the insurance company must pay.

D. REASONABLE MEN CANNOT DIFFER

There are two separate factors which preclude recovery in this case by respondent. The burden of proof is upon respondent to show that the death of the assured comes within the terms of the policy. With this in mind it is clear, first, that

taking the testimony of respondent in its most favorable light the conclusion is inevitable from the facts there presented and the testimony of respondent's physicians that the death of the insured was the result of concurrent, joint causes, consisting of the excitement of the accident and the disease or infirmity of the insured; and second, that considering all the facts and circumstances in the case, reasonable men cannot differ in the conclusion that the stroke of apoplexy commenced prior to the alleged accident.

The first factor has been considered in this brief, and we now turn to the second, which is equally as potent.

In the opinion of the Circuit Court of Appeals rendered in this cause, the Court said that the jury *might* conclude that Mr. Boult's conduct on First East Street was due to mistake caused by the similarity of the newly painted houses and by his inability to properly drive an automobile.

The Mississippi Supreme Court has written exhaustively about the possibility of a happening. We quote from the opinion of the Mississippi Supreme Court in a recent decision rendered in March, 1938, being the case of Teche Lines, Inc. v. Bounds, 182 Miss. 638, 179 So. 747:

> "In response to that inquiry appellee has not attempted to submit any argument that the happening was probable, but has urged that it was possible, and that since the jury has found that it actually occurred, it is not within the province of the court to inquire into it. Certainly it was possible, as almost anything is possible. We recently said in Yazoo & M. V. Railroad Co. v. Lamensdorf, 178 So. 80, 'that to present a possibility, rather than a believeable probability, is not a sufficient basis for a verdict and judgment.' Because the argument continues to be made, as here, and so often, that a bare possibility is converted by a jury verdict into an actuality or into a probability, there is need to more fully recur to, and to review, original principles on that question.

"If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence and is not sufficient to sustain a verdict. This is true even in those jurisdictions which still cling to the scintilla of evidence rule. And except in the few jurisdictions wherein the latter rule prevails, *the overwhelming weight of authority throughout the country is that believable or credible evidence in civil cases is that which is reconcilable with the probabilities of the case and that bare possiblities are not sufficient. Where evidence is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability, it will not support a verdict.*

" 'It has been commonly said: Verdicts must rest on probabilities, not on bare possiblities. There is not capacity in any number of the former to create the latter. So the person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor.' Samulski v. Menasha Paper Co., 147 Wis 285, 133 N. W. 142, 145. ' An inherently incredible story is not made credible by being sworn to. Nor can it be allowed to served as the foundation of a verdict.' McCarthy v. Bangor, etc., Co., 112 Me. 1, 90 A. 490, 492, L. R. A. 1915B, 140, 142. 'Courts are not required to believe that which is contrary to human experience and the laws of nature or which they judically know to be incredible, * * * although there may be evidence tending to support it.' Lessig v. Reading, etc., Co., 270 Pa. 299, 304, 113 A. 381, 382, quoting from Norfolk & W. R. Co. v. Strickler, 118 Va. 153, 86 S. E. 824. 'The jury will not be warranted in finding the existence of a fact on the positive testimony of a witness, which is contrary to conceded facts or matters of common knowledge, or to all reasonable probabilities.'

Lattar v. Fidelity etc. Co., 186 Wis. 116, 122, 202 N. W. 299, 302."

Common sense and common experience demonstrate to any man that a person who has been in the contracting business for a period of approximately 40 years, whose life's work has been the building and repairing and painting of homes and who is familiar with every foot of the neighborhood, would not become mistaken by the painting of several cottages. The insured in this case was a contractor, had been building and repairing houses as his life's work for 40 years. He was thoroughly familiar with this neighborhood, in which he resided, in a small town. In addition, he had been going to the house of Mr. McElligott almost once a month for approximately fifteen years to pay his insurance dues. There were only five houses in the block. The house on the western corner occupied a double lot and was a long bungalow, one of the old homes of the town and known to this date by the name of its original owner. The house to which he had been accustomed to go was the second house from the eastern corner. The house to which he went was the house next to the western corner. The fact that the testimony was that the cottages had been newly painted and were similar in appearance does not warrant the jury in converting a possibility of his having made a mistake into a probability that he did so. This taken in conjunction with the fact that after he had gone to the wrong house he was then directed to go to the proper house and made a second mistake by going to the incorrect house, makes it impossible for reasonable men to conclude that the insured was in his normal state. When to this is added the queer actions on the part of Mr. Boult in slamming three times into the dirt pile, the strain on one's credulity becomes too great.

It is true that the witness who testified to the actions of the insured in running into the dirt pile and then driving down the street and running up on the curb at the end of the block, stated that outside of these actions Mr. Boult appeared normal. If a man jumps out of a window, a witness to the same would readily say that other than his action in jumping out of the

window he appeared normal. What he did is the criterion; not what he might otherwise have not done.

When the United States Circuit Court of Appeals rendered its decision and held that the jury might have concluded that the insured was mistaken, it ignored and overlooked the fundamental fact that the insured was thoroughly familiar with the neighborhood, was himself a contractor, and could not possibly have been deceived by a coat of paint.

It is inconceivable to us—and it was to the Honorable District Court—that these actions denoted anything other than the fact that the insured at this time was suffering from the onslaught of the cerebral hemorrhage.

VI. CONCLUSION

In conclusion we respectfully submit that common sense and common experience preclude the respondent from a recovery in this case and that, even considering the facts alleged by respondent to be true, the same present a case of death caused by concurrent excitement and disease within the meaning of the policy; and further, that the opinion of the United States Circuit Court of Appeals has decided an important question of Mississippi law in conflict with its holdings.

Respectfully submitted,

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